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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10 AUGUSTINE GOLAFALE,

11                   Plaintiff,

12                   v.

13 SWEDISH HEALTH SERVICES,

14                   Defendant.

CASE NO. C14-1683JLR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

15                   **I. INTRODUCTION**

16         This matter comes before the court on Defendant Swedish Health Services, d/b/a  
17         Swedish Medical Group's ("Swedish") motion for summary judgment. (MSJ (Dkt.  
18         # 18).) Having considered the submissions of the parties,<sup>1</sup> the balance of the record, and

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<sup>1</sup> Within two days of oral argument and several weeks after the briefing concluded on the  
21         motion, both parties filed praecipes that purport to correct citations to the record in the original  
22         briefing and supplement the record itself. (See Pr. to MSJ Resp. (Dkt. # 49); 2d Pr. to Watts  
Decl. (Dkt. # 50); Pr. to 1st Dammel Decl. (Dkt. # 52).) The court would ordinarily be  
disinclined to consider the untimely praecipes, which are to be filed "as promptly as possible."

1 the relevant law, and having heard oral argument on March 31, 2016, the court GRANTS  
 2 Swedish's motion for summary judgment and DISMISSES this case WITH PREJUDICE.

3 **II. BACKGROUND**

4 **A. Mr. Golafale's Initial Employment With Swedish**

5 This is a case involving alleged discrimination in employment by Swedish against  
 6 Mr. Golafale. (*See generally* Compl. (Dkt. # 1).) Swedish hired Mr. Golafale in January  
 7 2011 to work as a refund specialist. (*See* 1st Dammel Decl. (Dkt. # 19) ¶ 2, Ex. A (Dkt.  
 8 # 19-1)<sup>2</sup> ("10/28/15 Golafale Dep.")<sup>3</sup> at 60:11-15, 78:4-5; *id.* ¶ 5, Ex. B ("Job Descr.") at  
 9 1-2.) Among the "essential duties [and] responsibilities" of a refund specialist is  
 10 "[e]nsur[ing] patient satisfaction through timely and effective processing of refund  
 11 requests." (Job Descr. at 1.) Prior to beginning work at Swedish, Mr. Golafale had held  
 12 numerous similar jobs in the greater Seattle area. (Golafale Decl. (Dkt. # 30) ¶ 5, Ex. A

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 14  
 15 Local Rules W.D. Wash. LCR 7(m) ("Parties are expected to file accurate, complete documents,  
 16 and the failure to do so may result in the court's refusal to consider later filed corrections or  
 additions to the record."). However, at oral argument, both parties agreed that the court should  
 17 consider the praecipes. In the interest of ruling on the motion for summary judgment with a  
 complete and accurate record, the court considers the parties' praecipes herein.

18       <sup>2</sup> The first Dammel declaration (Dkt. # 19) attaches Exhibits A through F (Dkt. # 19-1), G  
 19 through T (Dkt. # 19-2), U through DD (Dkt. # 19-3), and EE through QQ (Dkt. # 19-4). The  
 second Dammel declaration (Dkt. # 41) attaches Exhibits A through H (Dkt. # 41-1).

20       <sup>3</sup> The parties have placed excerpts from several depositions on the record. (*See, e.g.*, Dkt.  
 21 ## 19-1, 19-3, 19-4, 32-1, 32-2, 32-9, 32-18, 42-1.) A few of these excerpts appear in part in  
 multiple places in the record. (*See, e.g.*, 10/28/15 Golafale Dep. (Dkt. ## 19-1, 32-1).) When  
 first referencing the transcript of a particular deposition, the court indicates the docket number  
 and the deponent. However, in subsequent citations to that deposition transcript, the court does  
 not indicate which of the multiple locations on the docket contains that particular segment of the  
 relevant deposition.

1 at 1-3.) Before being hired, Mr. Golafale passed an “interview test” tailored to the  
2 position of refund specialist. (*See id.* ¶ 6, Ex. B at 1-7.)

3 Mr. Golafale’s performance review for 2011 describes an employee who was still  
4 learning the job but fully met or exceeded expectations in all categories. (Watts Decl.  
5 (Dkt. # 32) ¶ 5, Ex. C (Dkt. # 32-3) (“2011 Perf. Eval.”) at 1-2.) Although his supervisor  
6 indicated that he “was very much in a learning capacity during [the 2011] review period,”  
7 Mr. Golafale’s lowest score in any review category was “successful,” which indicates  
8 that he “fully m[et] standards and expectations.” (*Id.*)

9 In 2013, Lashunda Johnson took over as Mr. Golafale’s supervisor and Polly Clark  
10 took over as his manager. (1st Dammel Decl. ¶ 11, Ex. H (“2012 Perf. Eval.”) at 1.) Ms.  
11 Johnson and Ms. Clark completed Mr. Golafale’s performance review for 2012, which  
12 largely mirrored his 2011 review. (*See id.* at 2.) Mr. Golafale “me[t] the minimum  
13 expectations of [the refund specialist team’s] productivity standards” and took “great care  
14 to minimize any absences.” (*Id.*; *see also id.* at 3 (“Kept absences at a very low rate of  
15 occurrence.”).) However, Ms. Johnson once noticed Mr. Golafale giving a trainer  
16 “attitude,” felt that Mr. Golafale’s performance was “below average,” and indicates that  
17 he did not “fully grasp what he was working on.” (Johnson Decl. (Dkt. # 22) ¶¶ 3-4.)  
18 Ms. Clark states that she and Ms. Johnson “rated most employees as meeting  
19 expectations” for this period due to their “short time overseeing Refunds and the  
20 overwhelming workload running two groups.” (Clark Decl. (Dkt. # 21) ¶ 3.) Despite  
21 these observations, neither Ms. Clark nor Ms. Johnson made reference to them in Mr.  
22 Golafale’s 2012 performance review. (2012 Perf. Eval. at 1-3.)

1     **B. The Hiring and Promotion of Joshua Henriot**

2                 In February 2013, Swedish hired Joshua Henriot through a temp agency to serve  
 3 as a refund specialist. (Watts Decl. (Dkt. # 32) ¶ 4, Ex. B (Dkt. # 32-2) (“Henriot Dep.”)  
 4 at 29:14-17.) Mr. Henriot served in that position for approximately eight months,  
 5 working alongside Mr. Golafale after Mr. Golafale helped to train him. (*Id.* at 29:16-24;  
 6 Golafale Decl. ¶ 7.) In October 2013, Swedish promoted Mr. Henriot to supervisor of the  
 7 refunds unit.<sup>4</sup> (Henriot Dep. at 38:2-25, 45:13-15; Golafale Decl ¶ 7.)

8                 Mr. Golafale, on the other hand, had applied for approximately 60 different  
 9 positions within Swedish during his tenure there, and he received only one interview and  
 10 no job offers. (*See* Watts Decl. ¶ 6, Ex. D at 1; Golafale Decl. ¶ 8.) As Mr. Golafale  
 11 acknowledges, he did not meet the formal requirements for some of those positions. (*See*  
 12 MSJ Resp. at 4; Watts Decl. Ex. D at 1.) However, Mr. Golafale felt that he “had  
 13 education, experience, and qualifications to perform” those jobs. (Golafale Decl. ¶ 8.)  
 14 Mr. Golafale did not see a listing for supervisor of the refunds unit and was not alerted of  
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16                 <sup>4</sup> Mr. Golafale asserts that Mr. Henriot “was informed by his white boss that a  
 17 supervisory position had come open in the Refunds Unit.” (MSJ Resp. at 4; *see also* Pr. to MSJ  
 18 Resp. at 7-8.) As support for that proposition, Mr. Golafale cites to Exhibit B of Ms. Watts’s  
 19 declaration, which is the transcript of Mr. Henriot’s deposition, “at p. 23, lines 19-23; p. 24, lines  
 20 8-22.” (*See* MSJ Resp. at 3-4; *see also* Pr. to MSJ Resp. at 7-8.) Irrespective of whether these  
 21 page numbers are intended to refer to those generated by the court’s electronic filing system or  
 22 those inherent to the deposition transcript, the cited evidence fails to support Mr. Golafale’s  
 contention. Pages 23 and 24 of the deposition transcript pertain to Mr. Henriot’s employment  
 prior to joining Swedish. (*See* Watts Decl. Ex. B at 23:19-24:22.) Pages 23 and 24 of the ECF  
 pagination correspond to pages 38 and 45 of the transcript of Mr. Henriot’s deposition. (*See id.*  
 at 38, 45.) Although pages 38 and 45 of the transcript address Mr. Henriot’s attainment of the  
 position in October 2013, nowhere do they indicate how or when he became aware of the job.  
 (*See id.*)

1 the opening, and he attests that he would have applied if he had learned of the position  
2 that Mr. Henriot eventually obtained. (*Id.* ¶ 9.)

3 **C. Mr. Golafale's Final Written Warning**

4 Barring extenuating circumstances, Swedish handled requests for time off over the  
5 holidays on a first-come, first-served basis. (10/28/15 Golafale Dep. at 103:5-12.)

6 Requests for the 2013 holiday season opened in September, and Ms. Johnson "award[ed]  
7 as many as possible while maintaining adequate coverage." (Johnson Decl. ¶ 5.)

8 Employees submitted time off requests through an electronic time system, which also  
9 tracked whether those requests had been approved. (Golafale Decl. at 104:18-21,  
10 107:24-108:3.)

11 On October 8, 2013, Ms. Johnson emailed a group, included Mr. Golafale, to  
12 indicate that Swedish would "not approv[e] any additional time off requests for the  
13 holidays at this time." (1st Dammel Decl. ¶ 12, Ex. I at 1.) Mr. Golafale had not yet  
14 submitted an electronic request for time off. (10/28/15 Golafale Dep. at 104:18-25.)  
15 Nevertheless, he indicated that as of October 8, 2013, he had "discussed" with Ms. Clark  
16 his plans to take November 29, 2013, off of work for a trip to Portland, Oregon. (*Id.* at  
17 103:17-104:3 ("I had discussed [the trip to Portland] before the email and after the email  
18 and prior to the email, prior to the eve of my departure. I told Ms. Clark verbally. One  
19 time she was down—the last time I remember, she was down, doing her routine, walk-  
20 around in our cube, twice, that I had extenuating circumstances that let—that made it  
21 difficult for me to report back to work the day after Thanksgiving since I was going to be  
22 in Oregon. She was well aware of that. I informed her, and we had a discussion.").) Mr.

1 Golafale indicates that he “mentioned” his trip “three or four times,” including prior to  
 2 the October 8, 2013, email. (10/28/15 Golafale Dep. at 104:13-17.) According to Mr.  
 3 Golafale, “Ms. Clark assured [him] it would be fine to take the day off, despite the lack of  
 4 a formal response in the personnel system.” (Golafale Decl. ¶ 10.)

5 Ms. Clark, however, indicates that her only such conversation with Mr. Golafale  
 6 occurred around November 18, 2013. (Clark Decl. ¶¶ 6-8.) Ms. Clark declares that she  
 7 told Mr. Golafale that she “could not approve that day off, and that he was going to need  
 8 to work with Ms. Johnson to see if there would be enough coverage to allow him that day  
 9 off.” (*Id.* ¶ 7.) On November 18, 2013, Mr. Golafale submitted a written request to take  
 10 off November 29, 2013, which was the Friday after Thanksgiving. (*Id.*; 10/28/15  
 11 Golafale Dep. at 107:6-23.) Ms. Johnson, having already approved all possible requests  
 12 for November 29, told Mr. Golafale that “the request was or would be rejected” (Clark  
 13 Decl. ¶ 6), and she never spoke to Mr. Golafale “about this topic at all during the 2013  
 14 holidays.” (Johnson Decl. ¶ 6.) Mr. Golafale acknowledges that his electronic request  
 15 was never approved. (Golafale Decl. ¶ 10.)

16 On November 27, 2013, Mr. Golafale called in sick to attend his annual physical.  
 17 (10/28/15 Golafale Dep. at 165:17-21; 1st Dammel Decl. ¶ 13, Ex. J at 1; *id.* ¶ 17, Ex. N  
 18 at 1.) That day, Mr. Henriot emailed Ms. Clark and Ms. Johnson indicating his belief that  
 19 Mr. Golafale “planned on calling in and being out on Friday regardless of what anyone  
 20 approved or disapproved.” (Watts Decl. ¶ 9, Ex. G (Dkt. # 32-7) (“11/27/13 Email”) at  
 21 1.) The following day was a holiday, and Mr. Golafale failed to show up or call in on  
 22 Friday, November 29, 2013. (1st Dammel Decl. Ex. J at 1.) Mr. Golafale indicates he

1 took off November 29 only “in reliance on Ms. Clark’s assurance that it would be fine to”  
2 miss work that day. (Golafale Decl. ¶ 11.)

3 After learning that Mr. Golafale failed to show up for work on November 29,  
4 2013, Mr. Henriot spoke to Ms. Clark and Ms. Johnson about the absence. (2d Dammel  
5 Decl. ¶ 2, Ex. A (“Henriot Dep.”) at 57:21-58:12.) Sandra Milard, the human resources  
6 partner at Swedish, informed that conversation by providing an interpretation of the  
7 company’s attendance policy. (2d Dammel Decl. ¶ 3, Ex. B (“Milard Dep.”) at  
8 13:2-14:7.) Swedish’s employment handbook provides for automatic termination when  
9 an employee fails to show up or call—referred to as a “no-show no-call”—for more than  
10 one day. (*Id.* at 15:12-16; 1st Dammel Decl. ¶ 9, Ex. F (“Empl. Handbook”) at 32.)  
11 Swedish’s unwritten policy was to give a final written warning for a single-day no-show  
12 no-call. (Milard Dep. at 15:17-16:2, 16:11-15.)

13 When Mr. Golafale returned to work on December 2, 2013, Mr. Henriot issued  
14 Mr. Golafale a “final written warning” for his no-show no-call on November 29, 2013.  
15 (Golafale Decl. ¶ 12; 1st Dammel Decl. ¶ 14, Ex. K (“Final Written Warning”) at 1.) The  
16 final written warning cautioned that Mr. Golafale was to have “no other instances of not  
17 showing up for work and not calling in.” (Final Written Warning at 1.) Mr. Golafale  
18 spoke to Melody Albrecht, the “head of the department,” who assured Mr. Golafale that  
19 “if [he] ignored the warning and had no further attendance issues, it would have no  
20 negative effects on [his] employment at Swedish.” (Golafale Decl. ¶ 13.) Accordingly,  
21 Mr. Golafale neither wrote a statement for his personnel file nor appealed the disciplinary  
22 action, the other two options Ms. Albrecht posed. (*Id.* ¶ 12.)

1     **D. Mr. Golafale's FMLA Leave in December 2013**

2         On December 6, 2013, feeling "stressed and overwhelmed" by the "unfair  
3 treatment and unwarranted discipline," Mr. Golafale visited his doctor of more than a  
4 decade, Dr. Maria Flores, who diagnosed him with "major depression." (Golafale Decl.  
5 ¶ 15; 10/28/15 Golafale Dep. at 140:6-14; Flores Decl. (Dkt. # 31) ¶ 2.) Dr. Flores  
6 advised Mr. Golafale to "take a short leave of absence from work" and completed the  
7 appropriate certification paperwork under the Family and Medical Leave Act, 29 U.S.C.  
8 § 2601 *et seq.* ("FMLA"). (Flores Decl. ¶ 2.) Dr. Flores further indicated a six-month  
9 period in which symptoms of Mr. Golafale's depression and diabetes would include  
10 "inability to concentrate, significant fatigue, hypersomnia, and a general sense of feeling  
11 overwhelmed." (*Id.* ¶ 3, Ex. A ("FMLA Certification") at 3.) However, Dr. Flores  
12 informed Swedish that Mr. Golafale would not "need to attend follow-up treatment  
13 appointments or work part-time or on a reduced schedule because of [his] medical  
14 condition." (*Id.* at 4.)

15             The following work day, December 9, 2013, Mr. Golafale met with Jennifer  
16 Mellish to request leave under the FMLA. (10/28/15 Golafale Dep. at 159:5-14.) As  
17 recommended by Dr. Flores and requested by Mr. Golafale, Swedish granted Mr.  
18 Golafale FMLA leave from December 11, 2013, through December 20, 2013. (Golafale  
19 Decl. ¶ 15; FMLA Certification at 4; Dammel Decl. ¶ 19, Ex. P ("FMLA Leave Req.") at  
20 1.) Despite having the option to request intermittent leave or a reduced work schedule,  
21 Mr. Golafale indicated only a need for continuous leave from December 11 through  
22 December 20, 2013. (FMLA Leave Req. at 1.) Mr. Golafale came to work on December

1 10, 2013, but Mr. Henriot granted his request to leave at noon that day. (1st Dammel  
 2 Decl. ¶ 21, Ex. R.)

3 On December 12, 2013, Ms. Mellish, on behalf of Swedish, officially approved  
 4 Mr. Golafale's FMLA leave effective December 11, 2013, through December 20, 2013.  
 5 (1st Dammel Decl. ¶ 23, Ex. T ("FMLA Approval") at 1.) That approval letter instructed  
 6 Mr. Golafale that, "[s]hould the need for intermittent leave and/or a reduced work  
 7 schedule arise, please notify your manager and [Ms. Mellish] as soon as possible.  
 8 Documentation must be received from your healthcare provider certifying this need."  
 9 (*Id.*) Mr. Golafale acknowledges that he never notified his manager or Ms. Mellish about  
 10 a need for intermittent leave or a reduced work schedule. (10/28/15 Golafale Dep. at  
 11 182:21-183:3; 1st Dammel Decl. ¶ 24, Ex. U ("1/21/16 Golafale Dep.") at 50:25-51:5.)

12 Mr. Golafale spent some of his time on FMLA leave pursuing other job  
 13 opportunities. On December 10, 2014, he sent an email indicating that he "intend[ed] to  
 14 use of every once [sic] of [his] benefit [sic]" before leaving Swedish, and that he  
 15 "hope[d] to god" to "find a temporary job of some kind to get [him] out [of Swedish]."  
 16 (1st Dammel Decl. ¶ 25, Ex. V at 1.) During his FMLA leave, Mr. Golafale also set up  
 17 job interviews with AXA Advisors and Aflac Insurance. (*Id.* ¶¶ 26, 28, Exs. W, X.)  
 18 Although Mr. Golafale initially denied taking those interviews, when presented with the  
 19 relevant confirmation emails he acknowledged that he had scheduled interviews during  
 20 his FMLA leave. (1/21/16 Golafale Dep. at 51:19-52:7, 55:2-56:17.)

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1      **E. Mr. Golafale's Return to Work**

2      Mr. Golafale's first scheduled day of work following his FMLA leave was  
3 December 23, 2013, but he obtained a doctor's note excusing him from work on  
4 December 23 and December 24, 2013, due to a cold. (See 1st Dammel Decl. ¶ 29, Ex. Y  
5 at 1; 10/28/15 Golafale Dep. at 187:6-18.) Mr. Golafale did not work on December 25  
6 due to a holiday, and he returned to work on December 26, 2013. (10/28/15 Golafale  
7 Dep. at 188:6-12.)

8      Upon his return, Mr. Golafale met with Mr. Henriot and indicated that he "did not  
9 have time to complete everything that [his] physician wanted [him] to before coming  
10 back to work." (1st Dammel Decl. ¶ 30, Ex. Z ("12/26/13 Henriot Email") at 1; 10/28/15  
11 Golafale Dep. at 188:20-189:19.) Mr. Henriot emailed Mr. Golafale after the  
12 conversation to encourage Mr. Golafale to contact Ms. Mellish to educate himself on  
13 FMLA types and follow his doctor's orders by making a visit to the doctor before  
14 returning to work. (12/26/13 Henriot Email at 1.) That email also indicates that Mr.  
15 Henriot provided his contact numbers so that Mr. Golafale could contact Mr. Henriot  
16 directly whenever he had "an employment related issue or question," including "calling  
17 [Mr. Henriot] when [Mr. Golafale was] not going to make it in to work or [when he]  
18 would be late." (*Id.*)

19      On December 31, 2016, Mr. Golafale returned to Dr. Flores to follow up on his  
20 FMLA leave. (1st Dammel Decl. ¶ 31, Ex. AA ("12/31/13 Doc. Note") at 1; *see also*  
21 10/28/15 Golafale Dep. at 190:10-20.) Dr. Flores indicated that Mr. Golafale "[w]ants to

1 take intermittent FMLA as suggested by his manager.” (12/31/13 Doc. Note at 2.)

2 However, she denied that request and noted

3 [a]t this time, patient is not interested in antidepressants or counseling. We  
4 discussed the purpose of FMLA. His diabetes is not severe enough as well  
5 to warrant p.r.n. intermittent FMLA. It would be very difficult to justify  
getting intermittent FMLA for his condition specially [sic] since he is  
currently not getting any other treatment.

6 (*Id.*; *see also* 10/28/15 Golafale Dep. at 192:7-22.) After Dr. Flores denied Mr.  
7 Golafale’s request for intermittent FMLA leave, Mr. Golafale considered but declined to  
8 obtain a second medical opinion. (10/28/15 Golafale Dep. at 192:10-24.) On January 2,  
9 2014, having received no request for an extension, Swedish’s leave administrator  
10 informed Mr. Golafale that it would close the file pertaining to his December 2013  
11 FMLA leave. (1st Dammel Decl. ¶ 33, Ex. CC (“FMLA Closure Letter”) at 4 (“If you  
12 need restrictions or accommodations, please follow-up with your HR contact for further  
13 support.”).)

14 **F. Mr. Golafale’s Performance and Attendance**

15 In the fourth quarter of 2013, Mr. Golafale’s productivity metrics were subpar.  
16 (1st Dammel Decl. ¶ 34, Ex. DD (“PIP”) at 1.) In response, Mr. Henriot and Ike Duran  
17 coached Mr. Golafale regarding productivity and wrote up a “performance improvement  
18 plan,” which they provided to Mr. Golafale on approximately February 28, 2014. (*Id.*;  
19 10/28/15 Golafale Dep. at 99:15-23.) The plan indicated that Mr. Golafale attained a  
20 48.75 percent score on his quality audit, which has a passing score of 95 percent, and  
21 performed 3.94 transactions per hour, which is far below the passing rate of 10  
22 transactions per hour. (PIP at 1.) The plan also made reference to two prior performance

1 coaching session in 2014, which were due to a failing quarterly audit for the fourth  
 2 quarter of 2013. (*Id.*)

3       Although Mr. Henriot and Mr. Duran also provided improvement strategies in  
 4 prior coaching sessions, the February 28, 2013, performance improvement plan further  
 5 required Mr. Golafale to submit a “list of training needs” in order to meet tiered  
 6 improvement goals in quality and productivity over the span of six weeks. (*Id.* at 1-2.)  
 7 Finally, the plan indicated that “[f]urther occurrences of not making benchmark may  
 8 result in further counseling up to and including termination.” (*Id.* at 2.)

9       Mr. Golafale also struggled to timely arrive at work in 2013. (See 2d Henriot  
 10 Decl. (Dkt. # 42) ¶ 2, Ex. A (“Golafale Tardy Records”) at 1; *see also id.* ¶ 5, Ex. D  
 11 (“Golafale Weekly Schedule”) at 1.) Sometime in 2013, Swedish changed from a  
 12 flexible schedule, in which employees could put in their eight daily hours during a  
 13 flexible time range, to a fixed system, in which employees had a fixed start time and end  
 14 time. (2d Pr. to Watts Decl. ¶ 4, Ex. P (“Duran Dep.”) at 49:18-21.) That year Mr.  
 15 Golafale arrived late to work 33 times, which “popp[ed] out as the anomaly” because the  
 16 average Swedish employee arrived late only five times over the same span.<sup>5</sup> (1st  
 17 Dammel Decl. ¶ 38, Ex. HH (“3/27/15 Duran Email”) at 1; *id.* ¶ 39, Ex. II (“2013 Perf.  
 18 Eval.”) at 2.) Mr. Golafale continued to arrive late in 2014. (See, e.g., *id.* ¶ 40, Ex. JJ  
 19 (“4/1/14 Counseling Note”) at 1.) Ms. Milard, who is responsible for informing  
 20 managers when termination is acceptable, gave Mr. Duran approval to terminate Mr.

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 22       <sup>5</sup> Swedish provided employees five minutes of leeway before classifying them as tardy  
          for any given day. (See Duran Dep. at 46:8-9.)

1 Golafale in early March 2014. (Milard Dep. at 45:8-15; Duran Dep. at 38:2-12.)  
2 However, Mr. Duran instead opted to counsel Mr. Golafale in an effort to “get him back  
3 on track.” (Duran Dep. at 38:15-17.) In total, Mr. Duran and Mr. Henriot met with Mr.  
4 Golafale three or four times regarding his tardiness, and at least some of those meetings  
5 occurred after Ms. Milard gave Mr. Duran and Mr. Hentiot approval to terminate Mr.  
6 Golafale. (*Id.* at 38:2-12; Henriot Dep. at 98:21-99:2.)

7 One such meeting occurred on March 28, 2014, when Mr. Henriot and Mr. Duran  
8 met with Mr. Golafale to review Mr. Golafale’s 2013 performance—specifically, his  
9 productivity deficiencies and excessive absenteeism and tardies. (Duran Decl. (Dkt.  
10 # 23) ¶ 4.) Mr. Golafale’s performance evaluation for 2013, which Mr. Duran and Mr.  
11 Henriot prepared, indicates that he did not meet expectations in any category, and he  
12 received the lowest mark possible for dependability.<sup>6</sup> (2013 Perf. Eval. at 1-3.) In light  
13 of his final written notice, Mr. Duran especially sought to bring Mr. Golafale’s late  
14 arrivals to his attention. (3/27/15 Duran Email at 1.) Mr. Henriot followed up with Mr.  
15 Golafale reemphasizing the importance of attendance and punctuality and approving Mr.  
16 Golafale’s request for a flexible schedule the following week due to a doctor’s  
17 appointment. (1st Dammel Decl. ¶ 41, Ex. KK (“3/28/14 Emails”) at 1.)

18 Despite preparing his own schedule for the following week, Mr. Golafale arrived  
19 18 minutes late for his next day of work, which was Monday, March 31, 2014. (3/28/14  
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21         <sup>6</sup> In contrast, Mr. Golafale gave himself the highest mark for each category and declined  
22 to include any comments on his 2013 self-review. (Watts Decl. ¶ 19, Ex. Q (“3/11/14 Henriot  
Email”) at 1.)

1      Emails at 2; 4/1/14 Counseling Note at 1.) He arrived six minutes late on Tuesday and  
2      was again counseled that day regarding his attendance and punctuality. (4/1/14  
3      Counseling Note at 1.) Nonetheless, he arrived 10 minutes late on Wednesday, six  
4      minutes late on Thursday, and 47 minutes late on Friday, April 4, 2014. (See *id.*; 3/28/14  
5      Emails at 2.) When asked about these late arrivals, Mr. Golafale indicated that he had no  
6      pertinent medical excuses. (Golafale Dep. at 211:12-15.) Mr. Golafale then “called out”  
7      and was absent for his next three workdays on April 7-9, 2014, and arrived 13 minutes  
8      late on April 10, 2014. (1st Dammel Decl. ¶ 42, Ex. LL (“Term. Letter”) at 1.)

9      **G. Swedish’s Termination of Mr. Golafale**

10     Swedish terminated Mr. Golafale on April 11, 2014, for violating Swedish’s  
11    standards of conduct. (*Id.* at 1-2.) Mr. Duran confirmed the termination via a letter,  
12    which traced Mr. Golafale’s history of attendance issues, including his December 2,  
13    2013, final written warning, and identified Mr. Golafale’s April 2014 tardiness and  
14    absences as “the final incident(s) which led to the decision to terminate [Mr. Golafale’s]  
15    employment.” (*Id.* at 1.)

16     **H. Mr. Golafale’s Lawsuit**

17     Mr. Golafale alleges five causes of action against Swedish. Three of those causes  
18    of action contain claims that Swedish intentionally discriminated against Mr. Golafale on  
19    the basis of his race or national origin. (See Compl. ¶¶ 5.1-5.4 (alleging discrimination in  
20    violation of 42 U.S.C. § 1981 (“Section 1981”)), 6.1-6.4 (alleging discrimination in  
21    violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e,  
22    *et seq.*), 8.1-8.3 (alleging discrimination in violation of the Washington Law Against

1 Discrimination (“WLAD”), RCW 49.60.010, *et seq.*.) The other two causes of action  
 2 contain claims that Swedish failed to accommodate Mr. Golafale’s disabilities of diabetes  
 3 and depression. (*See id.* ¶¶ 7.1-7.4 (alleging failure to accommodate in violation of the  
 4 Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*), 9.1-9.3 (alleging  
 5 failure to accommodate in violation of the WLAD).) Mr. Golafale seeks actual economic  
 6 damages stemming from the alleged violations, reinstatement, and punitive damages.<sup>7</sup>

7 Swedish moved for summary judgment on all five of these claims. (*See* MSJ at 3.)  
 8 Mr. Golafale opposed the motion (*see* MSJ Resp. (Dkt. # 29)), Swedish replied in support  
 9 of its motion (*see* MSJ Reply (Dkt. # 40)), and the court held oral argument on March 31,  
 10 2016 (*see* Dkt. # 53).

### 11 III. ANALYSIS

#### 12 A. Legal Standard

13 Summary judgment is appropriate if the evidence, when viewed in the light most  
 14 favorable to the non-moving party, demonstrates “that there is no genuine dispute as to  
 15 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.  
 16 P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cty. of*  
 17 *L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of  
 18 showing that there is no genuine issue of material fact and that he or she is entitled to  
 19 prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her

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 21       <sup>7</sup> Although Mr. Golafale alleged emotional damages (Compl. ¶¶ 5.3, 6.3, 8.3, 10.2), he  
 22 has since dismissed his plea for that form of relief (*see* 2/16/16 Stip. (Dkt. # 25) at 1; 2/18/16  
 Order (Dkt. # 26) at 2).

1 burden, then the non-moving party “must make a showing sufficient to establish a  
2 genuine dispute of material fact regarding the existence of the essential elements of his  
3 case that he must prove at trial” in order to withstand summary judgment. *Galen*, 477  
4 F.3d at 658. The non-moving party may do this by use of affidavits (or declarations),  
5 including his or her own, depositions, answers to interrogatories or requests for  
6 admissions. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

7 The court may only consider admissible evidence when ruling on a motion for  
8 summary judgment. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773-75 (9th Cir. 2002).  
9 “Legal memoranda and oral argument are not evidence and do not create issues of fact  
10 capable of defeating an otherwise valid summary judgment.” *Estrella v. Brandt*, 682  
11 F.2d 814, 819-20 (9th Cir. 1982); *see also Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d  
12 1074, 1078 (9th Cir. 2003) (“Conclusory allegations unsupported by factual data cannot  
13 defeat summary judgment.”).

14 The court is “required to view the facts and draw reasonable inferences in the light  
15 most favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).  
16 Only disputes over the facts that might affect the outcome of the suit under the governing  
17 law are “material” and will properly preclude the entry of summary judgment. *Anderson*,  
18 477 U.S. at 248. The nonmoving party “must do more than simply show that there is  
19 some metaphysical doubt as to the material facts . . . . Where the record taken as a whole  
20 could not lead a rational trier of fact to find for the nonmoving party, there is no genuine  
21 issue for trial.” *Scott*, 550 U.S. at 380 (internal quotation marks omitted) (quoting  
22 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). As

1 framed by the Supreme Court, the ultimate question on a summary judgment motion is  
 2 whether the evidence “presents a sufficient disagreement to require submission to a jury  
 3 or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at  
 4 251-52.

5 **B. Motion for Summary Judgment**

6       1. Intentional Discrimination Claims

7       In the absence of direct evidence of discriminatory intent,<sup>8</sup> courts evaluate  
 8 discrimination claims under Title VII, Section 1981, and the WLAD using the *McDonnell*  
 9 *Douglas* framework. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028  
 10 (9th Cir. 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973));  
 11 *Manatt v. Bank of Am., NA*, 339 F.3d 792, 797 (9th Cir. 2003); *see also Kastanis v. Educ.*  
 12 *Emp. Credit Union*, 859 P.2d 26, 30 (Wash. 1993) (“This court has adopted the standard  
 13 articulated by *McDonnell Douglas* in discrimination cases that arise out of RCW  
 14 49.60.180 [the WLAD] and the common law.”). That framework requires the plaintiff to  
 15 make out a prima facie case showing (1) that he or she was a member of a protected  
 16 class, (2) that he or she was qualified for and performing adequately in the position in  
 17 question, (3) that he or she suffered an adverse employment action, and (4) either (a) that  
 18 similarly situated employees outside the protected class were treated more favorably, or  
 19 (b) that other circumstances surrounding the adverse action give rise to an inference of

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 21       <sup>8</sup> By beginning his discussion of intentional discrimination with reference to the  
 22 *McDonnell Douglas* framework, Mr. Golafale implicitly acknowledges that there is no direct  
 evidence of discriminatory intent in the record. (See MSJ Resp. at 12-13.)

<sup>1</sup> discrimination. See *Cornwell*, 439 F.3d at 1028; *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004).

“If the plaintiff establishes a prima facie case, the burden of production—but not persuasion—then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002) (citing *McDonnell Douglas*, 411 U.S. at 802). If the employer satisfies this burden of production, the burden shifts back to the plaintiff to show “that the articulated reason is pretextual ‘either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.’” *Id.* (quoting *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1123 (9th Cir. 2000)). “Circumstantial evidence of pretext must be specific and substantial in order to survive summary judgment.” *Bergene v. Salt River Project Agric. Improvement and Power Dist.*, 272 F.3d 1136, 1142 (9th Cir. 2001).

15        Although the court doubts whether Mr. Golafale has met his *prima facie* burden, it  
16 need not address this question.<sup>9</sup> Swedish has submitted substantial evidence  
17 demonstrating a legitimate, nondiscriminatory reason for firing Mr. Golafale—his  
18 inability to comply with the terms and perform the essential functions of his employment.

<sup>9</sup> The court is particularly skeptical that a reasonable factfinder could conclude that Mr. Golafale “was performing his job well enough to rule out the possibility that he was fired for inadequate job performance.” *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir. 1988). However, the court need not decide that issue because Swedish offers a legitimate, nondiscriminatory reason for Mr. Golafale’s firing and Mr. Golafale fails to demonstrate pretext.

1 (See generally MSJ; MSJ Reply) Mr. Golafale does not clearly oppose this conclusion in  
2 his briefing. (See generally MSJ Resp.)

3 At oral argument, however, Mr. Golafale's counsel argued that Swedish has not  
4 met its burden at the second stage of the *McDonnell Douglas* analysis because it did not  
5 go through the progressive discipline described in its employment handbook. Even if the  
6 court were inclined to consider this argument, which indirectly appears in Mr. Golafale's  
7 briefing only in a footnote to the "statement of facts," the court would reject it. (See MSJ  
8 Resp. at 7 n.2 ("In fact, [giving a final written warning on November 29, 2013,] is in  
9 direct conflict with Swedish's published policy, which calls for progressive discipline for  
10 attendance issues.").) Although Swedish did not proceed in perfect order, Swedish  
11 eventually provided Mr. Golafale every step of the "general guideline of progressive  
12 discipline" identified in their employment handbook. (Empl. Handbook at 32, 34-35.)  
13 Moreover, Swedish expressly indicates those guidelines are not obligatory. (*Id.* at 35  
14 ("The corrective actions below are a general guideline . . . . Depending upon the  
15 circumstances and the seriousness of the situation, [Swedish] will determine the most  
16 appropriate course of action to take. Corrective action may start with any of the action  
17 options below. . . . [Swedish] at all times reserves the right to discharge with or without  
18 cause or notice if it is deemed in the organization's best interest."); *cf.* MSJ Resp. at 7; Pr.  
19 to MSJ Resp. at 11.) Mr. Golafale's deficient performance and attendance issues—past  
20 and present—suffice to satisfy Swedish's burden. The burden then shifts to Mr. Golafale  
21 to demonstrate that Swedish's proffered explanation is pretextual. See *Villiarimo*, 281  
22 F.3d at 1062.

1        Although Mr. Golafale’s briefing is opaque on this issue, he makes three  
2 arguments that could be construed as applying to pretext.<sup>10</sup> (MSJ Resp. at 14-16.) First,  
3 he points to the manner in which Swedish disciplined him for missing work on November  
4 29, 2013. (*Id.* at 14-15.) Second, he argues that Swedish decided to terminate him a  
5 week before he was actually terminated. (*Id.* at 15.) Third, Mr. Golafale argues that  
6 Swedish treated him significantly differently than K.H.,<sup>11</sup> a white employee who Mr.  
7 Golafale contends was otherwise similarly situated. (*Id.* at 15-16.) None of these  
8 arguments demonstrate that “the employer’s proffered explanation is unworthy of  
9 credence.” *Chuang*, 225 F.3d at 1123.

10 Mr. Golafale attests that he had a conversation with Ms. Clark, who assured him  
11 that “it would be fine to take” November 29, 2013, off “despite the lack of a formal  
12 response in the personnel system.” (Golafale Decl. ¶ 10.) He further points to an email  
13 conversation between Mr. Henriot, Mr. Johnson, and Ms. Clark, which indicates that the  
14 three of them knew on November 27, 2013, that Mr. Golafale planned to be absent  
15 without permission on November 29, 2013, but nonetheless failed to inform him that the  
16 absence would be unexcused. (11/27/13 Email at 1.)

<sup>10</sup> Only two pages of Mr. Golafale's briefing conceivably pertain to pretext, and he did not label that section as such. (MSJ Resp. at 14-16.) In those two pages, Mr. Golafale cited to the record only twice. (*See id.* at 14-16 & n.4.) The court will not scour the record or entire documents in the record in search of evidence to support a party's position. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

<sup>11</sup> In the interest of privacy, the parties have agreed to identify K.H. only by her initials. (See Watts Decl. ¶ 15.)

1       The undisputed evidence demonstrates a subsequent four-month period in which  
2 Mr. Golafale frequently arrived late at work and performed at a substandard level. (*See*  
3 Golafale Tardy Records at 1; PIP at 1; 4/1/14 Counseling Note at 1.) Mr. Golafale  
4 emphasizes the role that the resulting final written notice played in his termination and  
5 posits that “[i]t is undisputed that Mr. Golafale did not have any issues with attendance  
6 until” November 29, 2013. (MSJ Resp. at 9.) However, Mr. Golafale in fact arrived late  
7 for work on 25 occasions between April 10, 2013, and November 29, 2013, and received  
8 numerous formal and informal counseling sessions regarding his attendance. (*See*  
9 Golafale Tardy Records at 1; Term. Letter at 1.) These facts belie Mr. Golafale’s  
10 contention that the unwarranted prior written notice triggered his attendance issues.

11       The difference between Mr. Golafale’s attendance record and that of K.H., his  
12 self-selected comparator, demonstrates that Mr. Golafale’s attendance figures warranted  
13 attention and discipline irrespective of the events leading up to November 29, 2013.<sup>12</sup>  
14 Mr. Golafale misreads K.H.’s personnel records to indicate “53 instances of unplanned or  
15 unpaid leave in 2013.” (Resp. at 11.) Although K.H.’s records evince a substantial  
16 number of late arrivals between April 3, 2013, and March 25, 2014, the majority of those  
17 late arrivals were excused pursuant “FMLA intermittent leave and the Seattle Sick and  
18 Safe law.” (2d Henriot Decl. ¶ 6, Ex. C (Dkt. # 42-1) (“K.H. Tardy Report”) at 1-2.)  
19 K.H. only had 14 unexcused late arrivals during that nearly yearlong period. (2d Henriot  
20 Decl. ¶ 6.)

21 \_\_\_\_\_  
22 <sup>12</sup> K.H., a white woman, was Mr. Golafale’s coworker in the refunds group. (Watts Decl.  
¶ 15; 1st Henriot Decl. (Dkt. # 20) ¶ 6.)

1 Mr. Golafale also differentiates the treatment that K.H. received to coach her  
2 through her attendance issues. (MSJ Resp. at 11.) Ms. Albrecht confirms that K.H. was  
3 “coached” at one point due to “an attendance issue.” (Watts Decl. ¶ 11, Ex. I at 34:3-14.)  
4 Typically, that begins with a conversation between the employee and “the supervisor or  
5 manager.” (*Id.* at 34:11-23.) Mr. Golafale fails to demonstrate how this process differs  
6 from the treatment Swedish afforded him. Following his FMLA leave, Mr. Golafale  
7 received no shortage of consultations from his superiors encouraging him to protect his  
8 health and offering to help resolve his attendance problems. (*See* 12/26/13 Henriot Email  
9 at 1 (“[T]his indicates that you may need more time on your FMLA. . . . I highly  
10 encouraged you to follow your doctor’s orders regarding the requested visit before going  
11 back to work.”); FMLA Closure Letter at 4 (“If you need restrictions or accommodations,  
12 please follow-up with your HR contact for further support.”); PIP at 2 (requesting “a list  
13 of training needs you feel you require to assist you with meeting our expectations”);  
14 3/28/14 Emails at 1-4 (approving Mr. Golafale’s request for an altered work schedule for  
15 the week of March 31, 2014, through April 4, 2014).)

16 Finally, Mr. Golafale fails to identify any indication of deficient performance—as  
17 contrasted with deficient attendance—by K.H., which contrasts with the evaluation he  
18 received on March 28, 2013. (2013 Perf. Eval. at 1-3.) Without reference to a specific  
19 page, Mr. Golafale refers the court to K.H.’s 62-page personnel file, but its contents only  
20 further highlight the differences between K.H. and Mr. Golafale. (*See, e.g.*, Watts Decl.  
21 ¶ 15, Ex. M (“K.H. File”) at 5 (“You now have a total of five unplanned occurrences in  
22 the rolling twelve month period of March 17, 2010 to March 18, 2011.”), 33-36 (evincing

1 that K.H.'s performance in 2013 was better than Mr. Golafale's in each of the seven  
2 categories reviewed at Swedish, based on a performance evaluation completed by the  
3 same supervisors); *cf.* 2013 Perf. Eval. at 1-3.) In sum, K.H.'s workplace issues were  
4 few, minor, and fleeting in comparison to Mr. Golafale's. (*See generally* K.H. File.) As  
5 a comparator, therefore, K.H. fails to demonstrate that Swedish's proffered reason for  
6 terminating Mr. Golafale was pretextual.

7 The court also finds unpersuasive Mr. Golafale's argument regarding the timing of  
8 Swedish's decision to terminate Mr. Golafale. (*See* MSJ Resp. at 15.) Mr. Golafale met  
9 with management regarding his absenteeism and late arrivals on March 28, 2014, and  
10 prepared his own schedule for the workweek of March 31 through April 4, 2014.  
11 (3/28/14 Emails at 2; 4/1/14 Counseling Note at 1.) He nonetheless arrived 18 minutes  
12 late on Monday, March 31, had another, similar meeting on Tuesday of that week, and  
13 still arrived more than five minutes late to work every single day of that week. (4/1/14  
14 Counseling Note at 1.) Even before he "called out" and was absent for his next three  
15 workdays and arrived 13 minutes late on April 10, 2014, there is no evidence that  
16 Swedish's proffered reason for termination was pretext for discrimination. (*See* Term.  
17 Letter at 1.) Because Swedish already had a legitimate, nondiscriminatory reason to  
18 terminate Mr. Golafale's employment as of the date they determined they would do so, it

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1 is inconsequential that Swedish eventually identified Mr. Golafale's later absences and  
 2 tardiness in his termination letter.<sup>13</sup> (*See id.*; *see also* 1st Henriot Decl. ¶ 5.)

3 Even assuming Mr. Golafale satisfied his *prima facie* burden, Swedish provided  
 4 ample evidence of a legitimate, nondiscriminatory reason for firing Mr. Golafale. In  
 5 reply, Mr. Golafale fails to "prove pretext 'either directly by persuading the court that a  
 6 discriminatory reason more likely motivated the employer or indirectly by showing that  
 7 the employer's proffered explanation is unworthy of credence.'"<sup>14</sup> *Raad v. Fairbanks N.*

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9       <sup>13</sup> At oral argument, counsel for Mr. Golafale made the additional argument that  
 10 Swedish's unsubstantiated assertion that Mr. Golafale was late more than 50 times in a year  
 11 constitutes further evidence of pretext. This argument, which could also undermine Swedish's  
 12 burden at the second stage of the *McDonnell Douglass* framework, is unavailing because the  
 13 record indeed substantiates Mr. Golafale's deficient attendance record. Swedish has provided  
 14 Mr. Golafale's typical weekly schedule (Golafale Weekly Schedule at 1; *see also* 2d Dammel  
 15 Decl. ¶ 5, Ex. D at 3), which Mr. Golafale confirmed was his schedule from the fall of 2013 until  
 16 he left Swedish in 2014 (10/28/15 Golafale Dep. at 79:5-14, 80:10-14); the timestamp for the  
 17 days on which Mr. Golafale arrived more than five minutes late (Golafale Tardy Records at 1);  
 18 an email record of Mr. Golafale altering his typical work schedule (3/28/14 Emails at 2); and  
 19 several contemporaneous communications that further confirm his attendance issue (PIP at 1;  
 20 4/1/14 Counseling Note at 1; Term. Letter at 1). Mr. Duran further indicated that whereas  
 21 Swedish used to operate on a flex schedule, it has since switched to a standard schedule "where  
 22 you have a start time and an end time, and . . . [a]ny changes have to be reported up." (Duran  
 Dep. at 49:9-23; *see also id.* at 46:9-13 ("And in addition . . . the schedules are fairly flexible,  
 you just need to communicate with us if you need an hour this day, leave early the next day, how  
 you can make it up.")); 10/28/15 Golafale Dep. at 80:1-9.)

It is possible that Swedish imperfectly calculated Mr. Golafale's absences by capturing some late arrivals that Mr. Golafale's supervisors had approved without documentation. A factfinder might reasonably conclude, therefore, that the list of Mr. Golafale's absences is over-inclusive. (*See* 1/21/16 Golafale Dep. at 88:22-24 (characterizing Swedish's count of 50 or more late arrivals as "a little bit excessive").) However, in light of the above evidence, no reasonable factfinder could conclude that Swedish miscalculated Mr. Golafale's late arrivals to the degree required to undermine or demonstrate pretext as to Swedish's proffered reason for firing Mr. Golafale.

<sup>14</sup> Mr. Golafale also repeatedly alludes to a conspiratorial effort by Swedish employees to set him up for discipline. (*See, e.g.*, MSJ Resp. at 5 ("Mr. Henriot . . . proceeded to set up a trap to begin the process of terminating Mr. Golafale's employment."), 7 ("[H]is supervisors . . .

1     Star Borough School Dist., 323 F.3d 1185, 1196 (9th Cir. 2003) (quoting *Tex. Dep't of  
2     Comm. Affairs v. Burdine*, 450 U.S. 248, 257 (1981)). Accordingly, the court grants  
3     summary judgment to Swedish on the intentional discrimination claims.

4        2. Failure to Accommodate Claims

5           To sustain a failure to accommodate claim under the ADA, Mr. Golafale must  
6     show that he “(1) had a disability as defined by the ADA; (2) was qualified to perform  
7     the essential functions of [his] job; (3) gave [his] employer notice of [his] disability and  
8     limitations; and (4) upon notice, the employer failed to adopt measures available to it in  
9     order to accommodate the disability.” *Austin v. Boeing Co.*, No. C12-0263MJP, 2013  
10   WL 230824, at \*4 (W.D. Wash. Jan. 22, 2013). “A failure to accommodate claim under  
11   the WLAD follows the same analysis.” *Id.*; see *Roeber v. Dowty Aerospace Yakima*, 64  
12   P.3d 691, 697 (Wash. Ct. App. 2003) (requiring the plaintiff to show “that (1) he had a  
13   sensory, mental, or physical abnormality that substantially limited his ability to perform  
14   the job; (2) he was qualified to perform the job; (3) he gave [his employer] notice of the  
15   abnormality and its substantial limitations; and (4) upon notice, [his employer] failed to  
16   affirmatively adopt measures available to it and medically necessary to accommodate the  
17   abnormality”); see also RCW 49.60.040(d). Once the employer is aware of a disability  
18   that may require accommodations, the ADA and the WLAD impose a duty on the

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19  
20   seemed to be working in concert against him.”), 14 (“Mr. Golafale was the target of a pre-  
21   conceived plan to set him up for discipline. . . . The emails make it clear that Mr. Henriot was  
22   actively out to get Mr. Golafale, and nothing was going to stand in his way.”). Even viewing  
the evidence in the light most favorable to Mr. Golafale, this theory mischaracterizes the  
underlying evidence, which evinces a concern with Mr. Golafale’s attendance and performance  
but does not imply any ill-intentioned collusive effort on the part of Swedish employees.

1 employer and the employee to engage in a good faith, interactive process to identify and  
 2 provide reasonable accommodations. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th  
 3 Cir. 2000), *reversed on other grounds*, 535 U.S. 391 (2002); *Humphrey v. Mem'l Hosp.*  
 4 *Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001) ("[N]either side can delay or obstruct the  
 5 process."); *Goos v. Shell Oil Co.*, 451 F. App'x 700, 702 (9th Cir. 2011) (unpublished)<sup>15</sup>  
 6 (quoting *Barnett*, 228 F.3d at 1113) ("[T]he employee's participation is equally important  
 7 because he or she generally knows more about his or her capabilities, and 'holds essential  
 8 information for the assessment of the type of reasonable accommodation which would be  
 9 most effective.'"); *Goodman v. Boeing Co.*, 899 P.2d 1265, 1269 (Wash. 1995) ("The  
 10 employee, of course, retains a duty to cooperate with the employer's efforts by explaining  
 11 her disability and qualifications.").

12 Mr. Golafale's claim fails because the evidence makes clear that Swedish made  
 13 every effort to engage in a good faith interactive process with Mr. Golafale but Mr.  
 14 Golafale declined to pursue an accommodation. Swedish granted Mr. Golafale exactly  
 15 the FMLA leave that Dr. Flores recommended and Mr. Golafale requested.<sup>16</sup> (FMLA  
 16 Leave Req. at 1; (Golafale Decl. ¶ 15; FMLA Approval at 1.) The form approving his  
 17 FMLA leave instructed Mr. Golafale to notify his manager and Ms. Mellish if the need  
 18 for intermittent leave or a reduced work schedule arose, but Mr. Golafale did not do so.

19 \_\_\_\_\_  
 20       <sup>15</sup> Unpublished Ninth Circuit decisions are not precedential but may be cited when issued  
 21 after January 1, 2007. See Ninth Cir. R. 36-3.

22       <sup>16</sup> Dr. Flores also indicated that Mr. Golafale would not need follow-up treatment  
 23 appointments or a part-time or reduced schedule due to his condition. (FMLA Certification at 4.)

1 (FMLA Approval at 1; 10/28/15 Golafale Dep. at 182:21-183:3.) When Mr. Golafale  
2 returned from his FMLA leave, Mr. Henriot recommended that he return to his doctor  
3 and seek further FMLA leave. (12/26/13 Henriot Email at 1.) At that time, Dr. Flores  
4 rejected Mr. Golafale's request for intermittent FMLA leave. (12/31/13 Doc. Note.)  
5 Swedish also informed Mr. Golafale in January 2014 that he should follow up with  
6 human resources if he needed "restrictions or accommodations." (1st Dammel Decl ¶ 33,  
7 Ex. CC at 4.)

8 Notwithstanding the lack of response from Mr. Golafale, Swedish continued its  
9 efforts to work with Mr. Golafale to improve his performance and attendance. Mr. Duran  
10 and Mr. Henriot counseled him several times in 2014 and generated a tiered performance  
11 improvement plan. (Duran Dep. at 38:15-17; Henriot Dep. at 98:21-99:2; PIP at 1.) That  
12 plan warned Mr. Golafale of the possibility of termination and invited him to submit a list  
13 of training needs in order to meet his performance improvement plan. (PIP at 1-2.) On  
14 the only occasion in which Mr. Golafale asked, Mr. Henriot immediately granted his  
15 request to alter his work schedule for the week. (3/28/15 Emails at 2.) Indeed, the last  
16 episode in Mr. Golafale's saga of tardiness and absence occurred during a week in which  
17 he made his own schedule. (*Id.*; 4/1/14 Counseling Note at 1; *cf.* MSJ Resp. at 19  
18 ("Swedish could have accommodated Mr. Golafale . . . by allowing him to occasionally  
19 clock in to work late.").)

20 Mr. Golafale admits that he made no requests for FMLA leave or accommodation  
21 of a disability besides the FMLA leave that he received in December 2013. (1/21/16  
22 Golafale Dep. at 50:25-51:5; *see also* 10/28/15 Golafale Dep. at 185:23-186:1 (indicating

1 that Swedish never denied Mr. Golafale a request for time off to go see his doctor.) Mr.  
2 Golafale nonetheless apparently contends Swedish had a duty beyond the actions the  
3 court has already described to ignore Mr. Golafale's unresponsiveness and inquire with  
4 his doctor. (See MSJ Resp. at 20 ("Dr. Maria Flores . . . would have supported an  
5 accommodation for a flexible start time had Swedish requested such a certification.").)  
6 Imposing this duty would expand "beyond reasonableness" the "continuing" obligation to  
7 engage in a "good-faith" interactive process. *Austin*, 2013 WL 230824, at \*5 ("It goes  
8 beyond *Humphrey*, and beyond reasonableness, to hold an employer to more than  
9 granting every accommodation request made."); *see also Humphrey*, 239 F.3d at 1137-38  
10 ("[A]n employer fails to engage in the interactive process as a matter of law where it  
11 rejects the employee's proposed accommodations by letter and offers no practical  
12 alternatives."); *Bedeski v. Boeing Co.*, No. C14-1157RSL, 2015 WL 5675427, at \*3  
13 (W.D. Wash. Sept. 25, 2015) (granting an employer summary judgment on its  
14 employee's WLAD and ADA failure to accommodate claims where the employer  
15 provided the employee information on requesting the accommodation and the employee  
16 only submitted medical documentation with no accommodation request); *see also Beck v.*  
17 *Univ. of Wisc. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("[N]either party  
18 should be able to cause a breakdown in the process for the purpose of either avoiding or  
19 inflicting liability. . . . [C]ourts should look for signs of failure to participate in good faith  
20 or failure by one of the parties to make reasonable efforts to help the other party  
21 determine what specific accommodations are necessary.").

1 The evidence demonstrates that Swedish engaged in continuing good-faith efforts  
2 to accommodate Mr. Golafale. Those efforts were unfruitful because Mr. Golafale was  
3 not “interactive” in the process—he received the only accommodation he requested, and  
4 his doctor indicated he did not need any further schedule flexibility. Even viewing the  
5 evidence in the light most reasonable to Mr. Golafale, no reasonable factfinder could  
6 conclude otherwise. Accordingly, the court grants Swedish’s motion for summary  
7 judgment as to Mr. Golafale’s claims for failure to accommodate under the ADA and the  
8 WLAD.

#### IV. CONCLUSION

10 For the foregoing reasons, the court GRANTS Swedish's motion for summary  
11 judgment (Dkt. # 18) and DISMISSES this case WITH PREJUDICE.

12 Dated this 5<sup>th</sup> day of April, 2016.

  
JAMES L. ROBART  
United States District Judge